85-1614

Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. POLLINA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN R. GULASH, JR.
GULASH & LIEBERTHAL
135 Elm Street
Post Office Box 9118
Bridgeport, Connecticut 06601
(203) 367-7440

60 pp

Question Presented For Review

Whether proof of knowledge that the proceeding was federal in nature is required to establish a violation of section 1503 of Title 18, United States Code?

List of Interested Parties

Counsel of record for Vincent J. Pollina certifies that the following parties have an interest in the outcome of this case.[1]

1. United States of America, represented by William C. Bryson, Attorney, Department of Justice, P.O. Box 14263, Ben Franklin Station, Washington, D.C. 20044, and John H. Durham, Special Attorney, Department of Justice, 142 Orange Street, New Haven, Connecticut 06507.

2. Solicitor General, Department of Justice, Washington, D.C. 20530.

[1] In addition to the United States of America and the petitioner, John G. Ardito was a party to the proceedings below. Mr. Ardito is not a party to this Writ of Certiorari.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Interested Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction of this Court	2
Statutory Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

	Page
Odom v. United States, 116 F.2d 996 (5th Cir. 1941), rev'd per curiam 313 U.S. 544 (1941)	7n
Pettibone v. United States, 148 U.S. 197 (1893)	6, 7
United States v. Baker, 494 F.2d 1262 (6th Cir. 1974)	7n
United States v. Grande, 620 F.2d 1026 (10th Cir. 1980)	7
United States v. Green, 745 F.2d 1205 (9th Cir. 1985)	9
United States v. Griffin, 525 F.2d 710 (1st Cir. 1975)	5
United States v. Jennings, 471 F.2d 1310 (2d Cir. 1973), cert. denied 411 U.S. 935 (1973)	6n
United States v. Kozak, 438 F.2d 1063 (3rd Cir. 1971)	7
United States v. Suggs, 755 F.2d 1538 (11th Cir. 1985)	9
United States v. Vesich, 724 F.2d 451 (5th Cir. 1984)	7n
United States v. Williams, 470 F.2d 1339 (8th Cir. 1973) cert. denied, 411 U.S. 936 (1975)	7
United States v. Vermian, 104 S. Ct. 2936, (1984)	9
Statutes:	
H.R. Rep. No. 96-1396, 96 Cong., 2d Sess (1980)	5
Title 18 U.S.C. § 1001	9
Title 18 U.S.C., Chapter 73	*passim*
Title 28 U.S.C. § 1254(1)	2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. POLLINA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vincent J. Pollina, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 31, 1986.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 782 F.2d 358, sub nom. *United States v. Ardito*, and is reprinted in the Appendix.[2]

[2] References in this petition are indicated as follows:

1. To numbered pages of the Appendix to petition (____a).

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1986. This Petition for Certiorari is being filed within sixty (60) days of the entry of said judgment. The jurisdiction of this Court is invoked in accordance with 28 U.S.C. §1254(1).

Statutory Provision Involved

Section 1503 of Title 18, United States Code (Influencing or injuring officer or juror generally)

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Statement of the Case

Petitioner, Vincent J. Pollina and three co-defendants, John G. Ardito, Gus and Francis Curcio, were originally joined in one count of an indictment charging a conspiracy to obstruct justice, in violation of 18 U.S.C. §371, 1503 (1982). The theory underlying the Government's case against the four defendants was that the defendants Pollina and Ardito conspired with the Curcios in a scheme to obtain a mistrial in the Curcios' Federal loansharking trial in Hartford, Connecticut. Essentially, the indictment alleged that defendants Pollina and Ardito obtained certain medications and agreed between themselves to convey them to the defendants, Gus and Francis Curcio. The medications were to be ingested by one of the Curcios, presumably Gus, before going to Court and the medication would cause him to exhibit the symptoms of a heart attack. The disruption and delay necessitated by the apparent illness would then cause a mistrial of the Curcios' loansharking trial.

The Curcio brothers pled guilty to the obstruction indictment prior to trial, and the defendants, Pollina and Ardito went to trial. Following a jury trial in Bridgeport, Connecticut, presided over by T.F. Gilroy Daly, Chief Judge of the United States District Court for the District of Connecticut, both defendants were convicted and received maximum penalties. (Five years imprisonment and Ten Thousand ($10,000.00) Dollar fines.)

Although the Government offered evidence that the petitioner knew the Curcios were on trial in Hartford, Connecticut,[3] the Government failed to offer any evidence that suggested that the petitioner knew that the Curcios were on trial in Federal Court.

---

[3] Government evidence principally consisted of two tape-recorded conversations (Nov. 4, 1983 and Dec. 7, 1983). The Nov. 4, 1983 conversation was between Vincent Pollina, Gus Curcio and Francis Curcio at 1935 Main Street, Bridgeport, Connecticut. The Dec. 7, 1983 conversation was between Vincent Pollina and John G. Ardito in an apartment in Bronx, New York. Both were results of Court authorized electronic surveilance orders.

Upon conclusion of the Government's case, neither defendant, Pollina nor Ardito presented any evidence, but their counsel argued a Motion for Judgment of Acquittal. After the district court denied the motion, counsel requested an actual knowledge jury instruction.[4] Namely, the Government must prove, among other things, that the defendant knew that the proceeding he sought to obstruct was a federal proceeding. The district court refused the requested instruction and, in effect, held that the Government need not prove that the defendant knew that the proceeding they were charged with seeking to obstruct was federal in nature.

On appeal from the conviction, the court of appeals held that the Obstruction of Justice Statute, 18 U.S.C. §1503, does not require the Government to prove that the proceedings which the defendants sought to obstruct were known by the defendants to be federal in nature. The district court's rulings were, therefore affirmed.

Reasons For Granting The Petition

In addressing the single, narrow issue here presented, this Court can take a big step toward resolving a significant, recurring problem in federal criminal law. Although it is certainly easy to say that some federal criminal statutes contain federal scienter requirements, it is often quite difficult to determine which statutes contain such requirements. Among the reasons cited by the House Committee on the Judiciary in justifying a proposed revision of the criminal code was:

> Another source of confusion is the legislative practice of defining Federal crimes in such a way as to make the Federal nexus an element of the offense indistinguishable from other elements. Questions inevitably arise as to whether the state of mind (mens

4 Defendant filed a Request to Charge containing eighteen separately numbered requests. The pertinent charge, numbered twelve, has been reprinted in the Appendix. (14a).

> rea) requirements modify the circumstances specifying the Federal nexus, thereby causing confusion about what conduct is actually proscribed. H.R. Rep. No. 96-1396, 96 Cong., 2d Sess. (1980) p 4.

A very good example of the problem can be found in Chapter 73 of the criminal code. The chapter entitled "Obstruction of Justice" consists of fifteen sections.[5]

In this case of first impression to the Second Circuit, the court held that Section 1503 of Title 18, United States Code (Influencing or injuring officer or juror generally) does not contain a federal scienter requirement. As noted by the court below "the statute does not require a specific intent to interfere with a proceeding known by the defendant to be federal in nature". (10 a). The decision is in sharp contrast to decisions of the courts of appeals for other circuits in relation to similarly worded chapter 73 offenses.

In *United States v. Griffin*, 525 F.2d 710 (1st Cir. 1975), the First Circuit held that Section 1509 of Title 18, United States Code (Obstruction of Court Orders) contained a federal scienter requirement. In order to prove a violation of the statute forbidding the forceful and willful attempt to prevent, obstruct, impede or interfere with the exercise of rights under a court order, the government must prove that the defendant realized that the busing he protested emanated from a federal court order as

---

[5] 18 U.S.C. §1501 Assault on Process server, §1502 Resistance of Extradition Agent, §1503 Influencing or injuring officer, juror or witness generally, §1504 Influencing juror by writing, §1505 Influencing or injuring witnesses before agencies and committees, §1506 Theft or alteration of record or process, §1507 Picketing or parading, §1508 Recording, listening to, or observing proceedings of grand or petit jurors while deliberating or voting, §1509 Obstruction of court orders, §1510 Obstruction of criminal investigations, §1511 Obstruction of State or local law enforcement, §1512 Tampering with a witness, victim, or an informant, §1513 Retaliating against a witness, victim or informant, §1514 Civil action to restrain harassment of a victim or witness, and §1515 Definitions for certain provisions.

distinguished from some other source of authority. In so holding the First Circuit relied solely on its interpretation of this Court's decision in *Pettibone v. United States*, 148 U.S. 197 (1893), a case dealing with Section 1503's antecedent statute.

The court below does little to reconcile the apparent conflict. Interestingly, the court tacitly admits that this Court's decision in *Pettibone* can be read to require proof of federal scienter in a section 1503 prosecution, but suggests that a "closer reading" (7a) of the decision compels a contrary conclusion.[6]

---

[6] In its discussion of *Pettibone v. United States*, 148 U.S. 197 (1893) the Second Circuit relies on its prior interpretation of the decision in *United States v. Jennings*, 471 F.2d 1310 (2d Cir. 1973), cert. denied 411 U.S. 935 (1973) wherein the court held that section 201(b)(1) of Title 18, United States Code (Bribery of Public Officials and witnesses) contained no federal scienter requirement. The court was apparently concerned by the following language of Chief Justice Fuller:

> The construction that applies to the first branch of section 5399 must be applied to the second, and if it were essential that a person accused should know that the witness or officer was a witness or officer in order to conviction (sic) of the charge of influencing, intimidating, or impeding such witness or officer in the discharge of his duty, so it must be necessary for the accused to have knowledge or notice or information of the pendency of proceedings in the United States Court, or the progress of the administration of justice therein, before he can be found guilty of obstructing, or impeding, or endeavoring to obstruct or impede the same. *Pettibone, supra* at 204-205.

and

> It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. The reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court. *Id* at 206.

Although the court admits that dicta in the Fifth and Sixth Circuits suggests a federal scienter requirement in §1503 prosecutions,[7] it found said dicta unpersuasive. (9a).

In order to prove a violation of Section 1510 of Title 18, United States Code (Obstruction of criminal investigation) the Government must prove that the defendant has actual knowledge that the recipient or intended recipient of information is a federal investigator. *United States v. Grande*, 620 F.2d 1026 (10th Cir. 1980), *United States v. Williams*, 470 F.2d 1339 (8th Cir. 1973) cert. denied, 411 U.S. 936 (1975), *United States v. Kozak*, 438 F.2d 1063 (3rd Cir. 1971). In holding that Section 1510 contains a federal scienter requirement, the Third, Fourth and Fifth Circuits impliedly conflict with the holding of the court below. The previously mentioned decisions of the First, Third, Fourth, Fifth and Sixth Circuits coupled with this Court's decision in *Pettibone* suggest that obstruction of justice offenses traditionally contain federal scienter requirements.

The most recently enacted obstruction of justice statute contains no federal scienter requirement. Section 1512 of Title 18, United States Code (Tampering with a witness, victim or informant) provides in pertinent part:

> (e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstances –
>
> (1) That the official proceeding before a judge, county magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

---

[7] *United States v. Vesich*, 724 F.2d 451 (5th Cir. 1984), *Odom v. United States*, 116 F.2d 996 (5th Cir. 1941), rev'd per curiam 313 U.S. 544 (1941), *United States v. Baker*, 494 F.2d 1262 (6th Cir. 1974).

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or serving the Federal Government as an advisor or consultant.

In failing to either amend or repeal the other chapter 73 sections and in failing to extend the lack of federal scienter language to the other chapter 73 sections, Congress further clouded the entire chapter.[8]

Review should be granted in this case so that the Court can, in one feil swoop, resolve the question of whether the numerous

---

[8] Congress was apparently aware of the potential for the problem here discussed. As noted by Representative Peter Rodino, the chairman of the full Committee on the Judiciary, to the House of Representatives on September 30, 1982 in a section by section analysis of what became the Victim and Witness Protection Act of 1982:

> ...section 1512 provides that no state of mind need be proved with respect to certain circumstances set forth in subsections(a). These circumstances are that the official proceeding involved is a Federal proceeding, that the judge involved is a judge of the United States or that the law enforcement officer is a Federal officer. This provision is necessary because of the convention that the state of mind applicable to the conduct required for the offense also applies to any circumstance or results that are required. Because the terms "official proceeding" and "law enforcement officer" are defined in section 1515 to mean Federal proceeding and Federal officer, and because section 1512(a) (3) refers to a "judge of the United States", it would be necessary for the prosecution, absent this provision, to prove that the defendant knew the official proceeding or law enforcement officer was a Federal proceeding or a Federal officer or that the judge was a Federal judge. Since the Federal nature of the proceeding and the Federal status of the officer or judge are matters of jurisdiction that go to the power of the Federal government to assert jurisdiction over conduct rather than to the criminal nature of the conduct, it is neither necessary nor appropriate to require proof that the defendant knew the proceeding, officer or judge was a Federal proceeding, officer or judge. Cong. Rec. House, Sept. 30, 1982 H 8204.

obstruction of justice offenses contain federal scienter requirements or not. This Court's ruling will either discourage future appeals for obstruction of justice convictions or prompt Congressional action on the long awaited Criminal Code Revision.

In the recent case of *United States v. Yermian*, 104 S. Ct. 2936, (1984) this Court considered a similar issue. Although the Court held that Section 1001 of Title 18, United States Code (Statements or entries generally) does not require proof of actual knowledge of federal agency jurisdiction in order to convict a defendant, the Court specifically reserved deciding whether the statute required some lesser degree of knowledge of federal agency jurisdiction. *United States v. Yermian, Id.* at 2939 n.4, 5, 2943 n.14.

The reservation was due to the fact that the trial court instructed the jury that the government must prove that the federal agency jurisdiction was reasonably forseeable. The Court's reservation has already provoked a good deal of appellate litigation. *United States v. Suggs*, 755 F.2d 1538 (11th Cir. 1985), *United States v. Green*, 745 F.2d 1205 (9th Cir. 1985).

In this case the Second Circuit effectively held that a Section 1503 prosecution did not require proof of any degree of federal scienter. In so ruling the Court specifically relied on the *Yermian* decision. (9,10a). This case will, therefore, enable the Court to decide the important question specifically reserved in *Yermian*.[9]

---

[9] Petitioner maintains that *Yermian* is distinguishable from this case. The statutory language and legislative history of 18 U.S.C. §1001 are much less ambiguous.

Conclusion

For the foregoing reasons, this Court should grant the petitioner's request and issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

JOHN R. GULASH, JR.
Counsel for the Petitioner

APPENDIX

DECISION OF COURT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 393, 394—August Term, 1985

(Argued November 6, 1985 Decided January 31, 1986)

Docket Nos. 85-1271, 85-1272

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN GREGORY ARDITO and VINCENT POLLINA,

Defendants-Appellants.

Before:

FRIENDLY, TIMBERS and PRATT,

Circuit Judges.

Appeals from judgments of conviction entered July 11, 1985 in the District of Connecticut, T.F. Gilroy Daly, *Chief Judge*, after jury trial, convicting appellants of

conspiracy to obstruct justice, in violation of 18 U.S.C. §§ 371, 1503 (1982).

Affirmed.

ARNOLD E. WALLACH, New York, N.Y. (Peter J. Peluso, New York, N.Y., on the brief), *for appellant Ardito.*

JOHN R. GULASH, Jr., Bridgeport, Conn., *for appellant Pollina.*

WILLIAM C. BRYSON, Attorney, Department of Justice, Washington, D.C. (Alan H. Nevas, United States Attorney, New Haven, Conn., and John H. Durham, Special Attorney, Department of Justice, New Haven, Conn., on the brief), *for appellee.*

TIMBERS, *Circuit Judge*:

Appellants John Gregory Ardito and Vincent Pollina appeal from judgments of conviction entered July 11, 1985 in the District of Connecticut, T.F. Gilroy Daly, *Chief Judge*. Following a jury trial, appellants were convicted of conspiracy to obstruct justice, in violation of 18 U.S.C. §§ 371, 1503 (1982).

We find that the principal issue on appeal arises from appellants' assertion that the obstruction of justice stat-

ute, 18 U.S.C. § 1503, requires proof that appellants knew the proceeding they obstructed was a federal proceeding. We hold that § 1503 does not require the government to prove that the proceedings which appellants intended to obstruct were known by appellants to be federal in nature. Other subordinate issues are raised.

For the reasons set forth below, we affirm.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

Appellants were convicted of conspiracy to obstruct justice because of their out-of-court activities during the trial of Francis and Gus Curcio. After the conclusion of the trial of the Curcios in Hartford for loansharking before a jury and T. Emmet Clarie, *District Judge*, appellants were indicted on August 30, 1984 for conspiring to aid the Curcios in obtaining a mistrial. The Curcios also were indicted in the instant case for conspiring to obstruct justice. They pleaded guilty before trial. Our Court previously has dealt with various aspects of the Curcio loansharking case. *See United States* v. *Curcio*, 712 F.2d 1532 (2 Cir. 1983); *United States* v. *Curcio*, 694 F.2d 14 (2 Cir. 1982); *United States* v. *Curcio*, 680 F.2d 881 (2 Cir. 1982).

The Curcio loansharking trial before Judge Clarie was plagued by a number of interruptions. The government presented its case between October 4 and October 19, 1983. Late in the evening of October 20, the first day of defendants' case, defendant Gus Curcio checked into a hospital complaining of chest pains. The next morning,

he checked out of the hospital. The court granted a postponement to allow for a further medical examination. On the day that trial resumed, October 27, Gus Curcio, who was seated at the defense table and in the presence of the jury, appeared to suffer a heart attack, clutching his throat and chest. Believing that a prosecutor was smiling at the outburst, co-defendant Francis Curcio charged at the prosecutor. At this point, Judge Clarie adjourned the trial and appointed a cardiologist to examine Gus Curcio. The examination was inconclusive, and the Curcios moved for a mistrial on November 8. Judge Clarie denied the motion and, after an angiogram was arranged for Gus Curcio and indicated no heart malfunction, ordered the trial to resume on November 15. On November 15, defense counsel reported that Francis Curcio had been injured in an automobile accident. Judge Clarie denied another motion for a mistrial. Francis Curcio attended the remainder of the trial in a wheelchair. The Curcio loansharking trial was ultimately resumed on December 6, with the presentation of evidence completed on December 8 and a verdict of guilty returned by the jury on December 14, 1983.

During the Curcio loansharking trial, the government conducted electronic surveillance at various locations, including a social clubhouse in Bridgeport, Connecticut, and premises in the Bronx occupied by appellant Ardito. Two conversations relating to the Curcio trial were introduced as evidence at appellants' obstruction of justice trial.

In a November 4, 1983 conversation between appellant Pollina and the Curcios at the Bridgeport clubhouse, the discussion included the loansharking trial, the desire for postponements and a mistrial, and the loansharking busi-

ness. Appellants Ardito and Pollina also were overheard in a December 7, 1983 conversation which took place in the Bronx. Appellants discussed the Curcio trial. Ardito handed Pollina three pills and instructed Pollina to give them to the Curcios. Ardito also gave Pollina an inhalant that he described as benzadrine, a type of amphetamine, for one of the Curcios to take. The pills were designed to cause one of the Curcios, presumably Gus, to vomit in court. The December 7 conversation also included loansharking business information that Ardito wanted relayed to the Curcios.

A government attorney reported the December 7 conversation to Judge Clarie on December 8, the last day of the Curcio trial. Judge Clarie warned the parties that further disturbances in the courtroom would result in revocation of the Curcios' bail. No further disruptions occurred.

At appellants' obstruction of justice trial, the recorded conversations of November 4 and December 7 were played for the jury. A toxicologist testified on behalf of the government regarding the effect of amphetamines in inducing the symptons of a heart attack and the effect of the drug Mettryl in inducing vomiting. An FBI agent defined such terms as "captain", "capo", "regime", and "crew"—terms which the jury had heard on the tapes. Appellants presented no evidence at the trial.

The jury returned guilty verdicts as to each appellant. The court sentenced each appellant to five years imprisonment and a $10,000 fine. Appellants are serving their sentences.

II.

The principal issue raised on appeal is whether 18 U.S.C. § 1503 requires proof that appellants knew that the proceeding they were charged with having obstructed was federal in nature. At trial, appellants requested such a jury instruction which Judge Daly denied. The tape recorded conversations which the government introduced at trial did not contain any statements which would suggest that appellants knew that the Curcios were being tried in a federal court. Appellants did not attend the Curcio trial in the federal court at Hartford.

Section 1503 does not provide for the scienter requirement which appellants urge upon us. They were charged under the following provision of the statute:

> "Whoever . . . corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1503. Both sides agree that the legislative history of § 1503 is not dispositive of the scienter controversy. Although appellants argue that Congress' express prohibition of knowledge of the federal nexus as an element of the offense under § 1512 shows that Congress knew how to prohibit such a scienter requirement when it wanted to, we find that argument unpersuasive in light of the fact that the present § 1503 has remained substantially unchanged since the enactment of its first predecessor in 1831, *see* Act of March 2, 1831, ch. 99, § 2, 4 Stat. 487, 488, and § 1512 was enacted only recently, in 1982.

Appellants rely primarily on *Pettibone* v. *United States*, 148 U.S. 197 (1893), in support of their assertion

that § 1503 contains such a scienter requirement. The *Pettibone* Court, in interpreting a predecessor statute to § 1503, stated that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." *Id.* at 206. *Pettibone* reversed convictions under the obstruction statute then in effect because the indictment did not charge that the purpose of the conspiracy was to violate an injunction or interfere with proceedings in the circuit court. While the circuit court had enjoined members of a labor union from interfering with a mining company's management, the indictment failed to charge that union members were aware of the injunction.

We examined the *Pettibone* decision in *United States* v. *Jennings*, 471 F.2d 1310 (2 Cir.), *cert. denied*, 411 U.S. 935 (1973). In holding that 18 U.S.C. § 201(b)(1) (anti-bribery statute) does not require knowledge that the bribee was a federal official, we interpreted *Pettibone* as follows:

> "[A] closer reading makes clear that the court was concerned with the necessity for charging knowledge or notice of the existence of the injunction, *as distinguished from its federal character.*"

471 F.2d at 1313 (emphasis added). In the instant case, we hold that the government was required to prove only that appellants conspired to interfere with the administration of justice, not that they knew which sovereign, federal or state, was administering that justice in the Curcio trial.

We also find unpersuasive appellants' reliance on cases which have arisen in other courts under § 1503. In *United States* v. *Baker*, 494 F.2d 1262 (6 Cir. 1974), the defendant

was charged with violating § 1503 as the result of his having threatened a police officer who planned to testify in a federal proceeding. The Sixth Circuit, however, held that there was insufficient evidence to establish that the threat related to the officer's testimony in a federal proceeding. There the officer had arrested the defendant several times. The officer's testimony in the federal proceeding was not the only conduct to which the threat could have applied. *Id.* at 1265. As the court stated, "[t]he mere existence of that federal proceeding is not sufficient to establish or support any inference that the federal proceeding was the focus of the alleged threat." *Id.* In *Baker* the issue was whether the proceeding which the defendant intended to influence by threatening a witness was federal or not, not whether the defendant *knew* that it was federal.

In the instant case there is no doubt that the subject of appellants' discussions and the provision of vomit-inducing medication related to the pending criminal prosecution against the Curcios in the federal court. That appellants did not know (or that their conversations did not suggest that they knew) in which court the Curcios were being tried does not preclude their being convicted under § 1503.

Similarly, the issue in *United States* v. *Vesich*, 724 F.2d 451 (5 Cir. 1984), was whether proceedings in fact were pending and whether the defendant had knowledge of such proceedings, not whether the defendant *knew* such proceedings to be federal in nature. As the *Vesich* court stated, "[a] prerequisite to any violation of section 1503 is the existence of a pending judicial proceeding known to the violator." *Id.* at 454 (citing *Pettibone*, *supra*, 148 U.S. at 205-07; *Odom* v. *United States*, 116 F.2d 996, 998 (5

Cir.), *rev'd on other grounds*, 313 U.S. 544 (1941)). The specific concerns of the *Vesich* court were whether grand jury proceedings in fact were pending, and whether there was sufficient evidence to establish that the defendant knew such proceedings were pending and that the witness he wished to influence was to testify before that body. While dicta in *Baker* and *Vesich* incidentally may merge the jurisdictional and scienter discussion because of the specific facts in those cases, they do not persuade us that, where a single judicial proceeding is known to be pending, the government must establish that appellants knew that justice was being administered in a federal court.

Our refusal to add to the statute a scienter requirement, in the absence of congressional intent to the contrary, is consistent with the Supreme Court's analyses of other statutes in *United States* v. *Feola*, 420 U.S. 671 (1975), and *United States* v. *Yermian*, 104 S. Ct. 2936 (1984). In a prosecution under the federal assault statute, 18 U.S.C. § 111, the *Feola* Court held that the statute does not require proof that the defendant knew the victim was a federal officer. "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." 420 U.S. at 685. *Feola* also made clear that the conspiracy statute, 18 U.S.C. § 371, does not require a showing that the defendant knew his conduct violated federal law. *Id.* at 687. And in *Yermian*, in holding that the federal false statements statute, 18 U.S.C. § 1001, does not include a scienter requirement with respect to the federal nexus, the Court concluded that " 'the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the

federal statute.' " 104 S. Ct. at 2940 (quoting *Feola*, 420 U.S. at 676-77 n.9). Indeed, the case for not requiring knowledge of the federal nexus is easier here than in *Feola* or *Yermian*, since the omnibus clause of § 1503, under which appellants were convicted, does not even mention federal jurisdiction.

We therefore hold that, while "the existence of an ongoing proceeding is an element of a § 1503 violation", *United States* v. *Reed*, 773 F.2d 477, 485 (2 Cir. 1985), as is an intent to impede the administration of justice, *United States* v. *Buffalano*, 727 F.2d 50, 54 (2 Cir. 1984) (citing *United States* v. *Moon*, 718 F.2d 1210 (2 Cir. 1983), *cert. denied*, 104 S. Ct. 2344 (1984)), the statute does not require a specific intent to interfere with a proceeding known by the defendant to be federal in nature. *United States* v. *Jennings*, *supra*.

III.

Appellants' other claims of error are without merit and only three require brief mention.

Both appellants assert that the "endeavor" which they were charged with conspiring to commit terminated when Gus Curcio sustained an apparent seizure in court on October 27, 1983; and that the subsequent conversation of December 7, 1983, and the provision of the emetic, therefore, were not encompassed under the conspiracy charge. In support of this claim, appellants rely on the language in *United States* v. *Minkoff*, 137 F.2d 402, 404 (2 Cir. 1943), that "[t]he offense was complete, regardless of success, when the first overt act to carry it out was committed." This misconstrues the law of conspiracy. The reference to "complete" refers to the point at which a

viable conspiracy charge existed; it does not mean that acts subsequent to the first overt act cannot be prosecuted. *United States* v. *Perlstein*, 126 F.2d 789, 798 (3 Cir.), *cert. denied*, 316 U.S. 678 (1942). The conspiracy count here properly encompassed activities which occurred during the presentation of evidence at the Curcios' trial, which ended on December 8, 1983.

Prior to the trial of the instant case, appellants moved to suppress the evidence obtained by electronic surveillance on the grounds that the warrant issued for the surveillance did not list obstruction of justice as a possible violation and the government did not comply with the sealing requirements of 18 U.S.C. § 2518(8)(a) (1982). On December 9, the government reported the contents of the December 7 conversation, explicitly detailing the evidence relating ot the § 1503 violation, to Robert W. Sweet, *District Judge*, who authorized an extension of the time period for electronic surveillance. In *United States* v. *Masciarelli*, 558 F.2d 1064, 1067-68 (2 Cir. 1977), we held that authorization under 18 U.S.C. § 2517(5) may be inferred when a judicial officer grants a continuation of the surveillance, even though the offense was not listed in the original order, so long as he was made aware of "material facts constituting or clearly relating to [the] other offenses" in the application for the continuance. *See United States* v. *Tortorello*, 480 F.2d 764, 781-83 (2 Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States* v. *Marion*, 535 F.2d 697, 703-04 (2 Cir. 1976). These requirements were amply satisfied here. Furthermore, the fact that the government did not present the recordings for sealing until January 5, 1984, five days after the first surveillance period expired, did not violate 18 U.S.C. § 2518(8)(a) which requires that such recordings be made

available to the judge "[i]mmediately upon the expiration of the period of the order". The intervening two-day holiday, the unavailability of the judge who issued the surveillance order for a third day, the need for the agent to prepare the paperwork for the extension of the surveillance, and the absence of prejudice, all combine to excuse the relatively short period of delay here in question. *See United States* v. *McGrath*, 622 F.2d 36, 42-43 (2 Cir. 1980) (eight day delay excused).

Appellants also assert that the court erred in admitting the expert testimony of an FBI agent who described such terms as "captain", "capo", "regime" and "crew". That testimony aided the jury in its understanding of the recorded conversations, and helped establish the relationship between appellants and the Curcios as well as appellants' interest in disrupting the Curcio trial. Moreover, Judge Daly specifically cautioned the jury as to the limited purpose of the agent's testimony and that the indictment did not charge conduct relating to organized crime activities. We hold that there was no abuse of discretion in the court's determination that the probative value of the agent's testimony outweighed any potential prejudice. *See United States* v. *Riccobene*, 709 F.2d 214, 230-31 (3 Cir.), *cert. denied*, 464 U.S. 849 (1983) (explanation of organized crime terms allowed).

We have considered carefully all of appellants' claims of error and we hold that all are without merit.

IV.

To summarize: Under 18 U.S.C. § 1503 the government need not establish that the proceedings which appellants intended to disrupt were known by appellants to be

federal in nature. We decline to add to the statute a scienter requirement that a person know which sovereign, federal or state, is administering the justice which he is charged with having impeded. We hold that appellants' other claims of error are without merit.

Affirmed.

PORTION OF DEFENDANT'S REQUEST TO CHARGE

REQUEST NO. 12

THE SUBSTANTIVE OFFENSE

You are instructed that the Government must prove beyond a reasonable doubt that each defendant charged with the conspiracy alleged in the Indictment had the criminal intent to commit the crime of obstruction of justice which was the object of the conspiracy, [18 U.S.C. 1503].

It is therefore necessary to consider the elements of the offense of obstruction of justice.

18 U.S.C. Section 1503 provides that:

> "Whoever corruptly endeavors to influence, obstruct or impede the due administration of justice [shall be guilty of a crime"].

In order to prove a person guilty of obstruction of justice, the prosecution must prove each of the following elements beyond a reasonable doubt:

First, a petit or trial jury, duly impaneled, was hearing the case of *U.S. v. Francis and Gus Curcio.*

Second, that the person knew that such proceeding was in progress in Federal Court, and,

Third, that the person did corruptly obstruct or impede or endeavor to obstruct or impede the proceeding.